Filed 1/24/19 In re J.C. CA1/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| In re J.C., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>J.C.<br>Defendant and Appellant. | A154000<br><br>(Napa County Super. Ct. No. 201835697-01) |

J.C. was declared a ward of the court and placed on probation after being found to have committed the offenses of resisting an officer and battery on an officer. He contends there was insufficient evidence to support findings that he committed these offenses because the officer used excessive force in arresting him. He also challenges as unreasonable and overbroad a condition of probation requiring him to provide passwords for and submit to searches of electronic devices under his control. We will find the challenged probation condition invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and otherwise affirm.

## BACKGROUND

J.C., 14 years old at the time the petition was filed, lived with his father, John, but often stayed at his mother's house about two blocks away.[1] John testified that in the weeks prior to February 15, 2018, J.C. had been disobedient and defiant with regard to matters such as getting up for school, going to bed on time or putting his phone away, but he had started counseling and going to class, and things seemed to be "starting to turn around."

On February 15, John had dropped J.C. off at his mother's house after missing a doctor's appointment due to a mix-up about timing. J.C. was "not in a good mood": He had been sick for a couple of days, was "in a lot of pain" from cold sores in his mouth, did not have medicine and was "just miserable." He texted John saying he wanted to get something to eat and then, in a phone conversation, asked John to come get him. John told J.C., "you could say please," and when J.C. said he wanted something "right now," John said he was not going "right this minute." J.C. said he was hungry and wanted something to eat, and, "I'm gonna come over there and kick your butt."

John hung up and called the police, telling the dispatcher he was fearful for his safety. The transcript of the 911 call shows that John asked the operator to "send somebody [unintelligible] quick" because J.C. was "only a block away," and said J.C. had been "threatening him for weeks," was "getting worse and worse" and John was worried about his and his family's safety. John said J.C. did not use weapons or have a history of violence but got into fights at school. At the jurisdictional hearing, John testified that he called the police because he wanted J.C. to see "what could happen to him if he keeps not . . . behaving correctly"; John testified that he had good rapport with the sheriffs, who were "really friendly," and he figured they would talk with J.C. and explain to him that his "misbehavior [was] going to get him in trouble," as John had seen

[1] J.C.'s parents separated in 2006. Also in 2006, J.C. and his brother were in his mother's car when, while taking items out of the trunk, his mother was struck by a drunk driver's vehicle and lost both her legs.

them do with others in the neighborhood. He testified that when he told the dispatcher he was scared, he was referring generally to J.C.'s defiant behavior, not a particular threat.

Just after the call, J.C. arrived at John's house, on foot, without shoes, and carrying a large, heavy sledge hammer. He "was acting like he was gonna tap it on my car . . . window." John, who had opened the door but stayed inside, told appellant to hold on and he would come out; he was waiting for the police to arrive, thinking they would talk to J.C. and keep the situation from escalating. John testified that he was not afraid J.C. was going to hurt him; he could tell appellant wanted him to come out to take him to get food and was insinuating that he would damage the truck if John did not, but "he didn't say please and I didn't want to do it."

Within seconds of appellant's arrival, Sheriff's Deputy Stephen Tong pulled up. Tong testified that he saw J.C. standing next to a truck, holding a sledge hammer with both hands, down toward the ground. Fearful for his safety and that of the person who had called to report threats, Tong opened his car door, drew his firearm, pointed it at J.C. and ordered J.C. to drop the hammer. J.C. did so, and Tong holstered his firearm.

J.C. started to walk away from the officer, toward the house. Tong followed at "a good pace to close the distance," intending to detain J.C. by grabbing his arms from behind. The officer testified that as soon as he put his hand on J.C., J.C. "flipped around and started throwing punches, punched me in the face." Tong blocked and counterpunched. He then pushed appellant off him, and J.C immediately turned and started to walk toward the house. Based on the reported threats, J.C.'s behavior, and not knowing whether J.C. had other weapons and was going to attack John, Tong deployed his taser, which struck J.C. J.C. fell down, hitting his head on a table outside the front door. Tong ordered him to put his hands behind his back but J.C. continued to resist, trying to get up. Fearing that J.C. was going to try to fight, Tong deployed the taser again. He was then able to detain J.C. Tong called for an ambulance and J.C. was taken to the hospital, medically cleared, and booked into juvenile hall. Once appellant was in the ambulance, Tong spoke with John, who told him he was scared of J.C.

Tong testified that his body camera was activated throughout the incident but during the struggle it went off for two or three seconds. Questioned about the recording captured by his body camera, Tong acknowledged that it showed J.C. "starting to go down" to his knees and "putting his hands up" but testified that J.C. did not put his knees on the ground and that "in the moment" Tong did not see J.C. start kneeling down or putting his hands up because everything happened so quickly. Tong acknowledged that J.C. "went forward" as Tong grabbed him but denied pushing J.C. intentionally. He acknowledged that his hand was on J.C.'s head as he was trying to take J.C. into custody but denied that he pushed J.C.'s head down into the cement. John was standing in the doorway saying, "[J.C.], why did you do that?" Tong denied that any of the actions he took were out of anger, that he drove his knee into J.C.'s back and forced the taser probes further in, that he went flying over J.C., that he threw the first punch, or that he hit J.C. in the back of the head. He acknowledged that J.C. did not touch him until he put his hands on J.C., and that at the point he put his hands on J.C., J.C. was not "actively resisting" him or trying to escape.

John, who was standing in his doorway throughout the incident, testified that he yelled to his son, "put down the hammer, he's got a gun," then yelled, "he's only 14 years old, don't shoot him." John did not hear the officer tell J.C. to get on the ground. He saw J.C. put the hammer down and start to get down on his knees to submit, then "he just got tackled with full force from the back, mid back section . . . like a total football tackle." J.C. "kind of flew forward" and put his hands down, and "he tackled him with such great force that the officer flew right off the top of him, because he was trying to pile drive him into the ground." J.C. came up fighting; the officer "was throwing haymakers over the top like you knock somebody out with" and J.C. was punching back and trying to duck the officer's punches. When they separated, J.C. said something to the effect of "you hit me" and "don't shoot me," and backed away with his hands "out toward the officer," blocking his face. As J.C. was "twisting" his body away, he was shot with the taser. J.C. did not make any verbal threats or aggressive movements toward John or the house. When J.C. was lying face down on the porch, the officer put his knees on top of J.C. and

forced his head to the ground. J.C. repeatedly said "cuff me, cuff me" and John said, "he's submitting," but the officer shot the taser again. The officer appeared to be angry: Even after J.C. was cuffed, the officer turned him on his back, pushing and putting pressure on the taser "darts" that were sticking into J.C.'s back. J.C. was saying, "my back, my back," and John also pointed out the things on his back; the officer said, "I know, two more steps and I would have shot him. With a gun."

Video recordings of the episode from Tong's body camera and a surveillance camera on John's house show that when Tong arrived, J.C. was standing by a truck parked at the curb, holding a sledgehammer hanging at his side. Tong pointed his gun at J.C. and ordered him to drop the sledgehammer, which J.C. did while nonchalantly taking a few steps toward the officer, pointedly turning his face away from Tong. J.C. then stopped and turned his body toward the house, facing away from Tong. As the officer, still pointing his weapon at J.C., yelled for J.C. to get on the ground, J.C. turned slightly farther away from the officer and moved his hands to his sides, appearing to put his hands on or briefly in his pockets and then letting them hang at his sides. Tong yelled again for J.C. to get on the ground and, again, J.C. did not. After a moment, Tong holstered his weapon and ran at J.C., who appeared to stumble and bend forward with his hands touching the ground. He stood up and immediately punched Tong, and the two punched each other for eight or nine seconds. When they broke apart, appellant moved toward the house and Tong deployed the taser, appellant fell and hit his head on a concrete planter, then continued to struggle and repeat, "why would you do that, I was already down," as Tong held him down and cuffed his wrists behind his back, then pulled him into a sitting position. John came over, lay appellant on his back and tended to the cut on his head.

A juvenile wardship petition (Welf. & Inst. Code, § 602) was filed, alleging three counts: Resisting arrest (Pen. Code,[2] § 69), battery on an officer (§ 243, subd. (b)), and threats to commit a crime resulting in death or bodily injury (§ 422). J.C. contested jurisdiction, arguing as to the first two counts that Tong used excessive force to detain

[2] Further statutory references will be to the Penal Code unless otherwise specified.

him. The court held that Tong used reasonable force, sustained the allegations of counts 1 and 2, and found the allegations of count 3 not true. J.C. was declared a ward of the court, with placement in the home of his mother or father subject to various conditions.

**I.**

Section 69, subdivision (a), punishes "[e]very person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty." Section 243, subdivision (b), punishes the commission of a battery "against the person of a peace officer . . . engaged in the performance of his or her duties . . . and the person committing the offense knows or reasonably should now that the victim is a peace officer . . ."

"[A] defendant cannot be convicted of an offense against a peace officer ' "*engaged in . . . the performance of . . .* [*his or her*] *duties* " ' unless the officer was acting lawfully at the time the offense against the officer was committed." (*In re Manuel G.* (1997) 16 Cal.4th 805, 815, quoting *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.) Thus, "[b]efore a person can be convicted of either of these offenses there must be proof beyond a reasonable doubt that the officer was acting lawfully at the time the offense against him was committed." (*In re Joseph F.* (2000) 85 Cal.App.4th 975, 982.)

"A peace officer is not 'engaged in the performance of his or her duties' within the meaning of these statutes if he arrests a person unlawfully or uses excessive force in making the arrest." (*People v. Delahoussaye* (1989) 213 Cal.App.3d 1, 7.) Excessive force claims are analyzed under the " 'reasonableness' standard" of the Fourth Amendment. (*Graham v. Connor* (1989) 490 U.S. 386, 395.) "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." (*Id.* at p. 397.) Factors to be considered include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Id.* at p. 396.)

The question for this court is whether substantial evidence supports the juvenile court's conclusion that the police officer in the present case used reasonable force. J.C. does not challenge the court's conclusion that Tong had a legal right to detain him based on the 911 call, in which John stated that his son had been threatening him for weeks and he was worried about his and his family's safety, and the fact that J.C. was holding a sledge hammer when Tong arrived. Nor does J.C. deny punching the officer, or challenge any of Tong's conduct subsequent to that punch. His claim of excessive force is based on Tong's conduct in running at him and causing him to fall, which J.C. argues was not justified by the severity of the offenses at issue, the immediacy of any threat he posed, or his failure to "*instantaneously*" comply with Tong's first command to get on the ground.

The court described its view of the evidence as follows: "Officer Tong testified that . . . he moved quickly toward [J.C.] with the intent to grab hold of his arms. Officer Tong credibly testified that he did not see that J.C. was starting to raise his hands and did not see that J.C. was going down on a knee. He rushed for J.C. and while attempting to secure him, rather than grabbing his arms, he pushed toward him which caused J.C. to stumble. A fight ensued and the video shows that J.C. swung at Officer Tong first."

J.C. argues that his potential offenses were not severe, in that before Tong used force, J.C. had dropped the hammer, walked away from it, raised his hands and begun to kneel, and he was not wearing bulky clothing that could have concealed another weapon. Having reviewed the video recording of the incident, we agree with the trial court that Tong was credible in testifying that, in the moment, he did not see J.C. begin to raise his hands and kneel. The video shows that J.C. began to raise his hand and bend his knees at the same moment, or even after, Tong began to move toward him. It is apparent that Tong did not see J.C. begin to comply before taking action in response to his initial lack of compliance.

The question, then, is whether the amount of force Tong used in detaining J.C. was objectively reasonable based upon the circumstances prior to J.C.'s belated attempt to comply. "The 'reasonableness' of a particular use of force must be judged from the

perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham v. Connor, supra,* 490 U.S. at p. 396.) "With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' [citation], violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." (*Graham,* at pp. 396–397.)

Here, Tong was dispatched in response to a father's call for emergency assistance due to a threat from his son that the father said caused him to fear for his and his family's safety; he asked the 911 operator to send someone "quick" because J.C. was only a block away, and said that problems with his son had been "getting worse and worse." The video recordings show that after dropping the sledgehammer in response to Tong's order, J.C. took a few steps toward the officer while pointedly looking away, then turned toward the house and, after being commanded to get on the ground, turned further away from the officer and moved his hands near his pants pockets. Despite his obvious knowledge that a police officer was pointing a gun at him and ordering him to get down, J.C. appeared to ignore another such command. Although Tong acted quickly at this point, he holstered his gun before moving toward J.C. and the position of his arms is consistent with his testimony that he was trying to grab appellant, not to intentionally push him. As the trial court indicated, it appears that in rushing toward J.C., Tong's forward motion caused appellant to stumble and bend over with his hands to the ground.

Given what Tong knew—that J.C.'s father had called 911 reporting fear for his safety because J.C. had threated to "kick his butt" and that J.C. was holding a sledgehammer when the officer arrived, Tong certainly had reason to be concerned that J.C. posed a threat to his father or others in the house. J.C.'s response to the officer was strange: Although he dropped the sledgehammer, he was decidedly noncompliant with Tong's orders to get on the ground and deliberately turned his back on the officer, despite the fact that the officer was pointing a gun at him and yelling commands. In light of this

rather odd response to a police officer's show of authority, with no way to know what J.C. would do next, and knowing that J.C.'s father was sufficiently concerned about his own and his family's safety to call 911, Tong's decision that physical intervention was necessary to avoid potential escalation of an unpredictable situation was not unreasonable. He moved toward J.C. at a run and the force with which he made contact caused J.C. to stumble, but Tong did not knock J.C. to the ground, did not fall himself, and certainly did not "fly" over J.C. as John described. J.C. was not injured by Tong's action; the injuries he suffered occurred only after he punched Tong, during the struggle that led to Tong's deployment of the taser and J.C.'s fall.[3] We agree with the trial court's conclusion that Tong's use of force was not unreasonable under the circumstances.

**II.**

Among the conditions of probation recommended by the probation department was an electronic device search condition requiring J.C. to "submit all electronic devices" under his control to search and seizure by any law enforcement or probation officer at any time, with or without reasonable suspicion or warrant, and to "disclose any and all passwords, passcodes, password patterns, fingerprints, or other information required to gain access into any electronic device" as requested by any such officer. When J.C.'s attorney objected to this condition at the disposition hearing, the probation officer told the court that "this is a standard thing that allows us if we do to see what's going on. I mean it's pretty common in our society that people do see bullying, making threats, and doing different things with their phones. They use their phones for everything. So, you know, we're not going to for no reason search their phone. But at times there might be

[3] Appellant argues that absence of injury does not establish reasonable use of force, which is—in the abstract—certainly true. In the cases appellant cites, the excessive force involved officers pointing guns at suspects at close range (*Robinson v. Solano County* (9th Cir. 2002) 278 F.3d 1007, 1013–1015) and holding guns against the suspects' heads. (*Baldwin v. Placer County* (9th Cir. 2005) 418 F.3d 966, 969–970.) In such circumstances, the excessive force results not from actual physical contact but from the threat of grievous injury. Where, as here, the excessive force involves physical contact, the absence of injury—while not dispositive—may be indicative of the degree of force involved.

something that happens at school, or in their home, and it has to be related to the phone, and we need to be able to see what's going on." Defense counsel argued that the broad search condition allowed an invasion of privacy that was not justified by a general interest in knowing everything happening in a minor's life, and that J.C.'s offense did not involve use of a cell phone and there was no indication he was involved with drug sales or regular drug use.

The court agreed that the recommended condition was "overbroad with respect to *Lent*" and modified it to state that J.C. must "submit all electronic devices under his control to a search of any media or communication reasonably likely to reveal . . . criminal activity with or without a search warrant, arrest warrant, or reasonable suspicion at any time of the day or night, and provide the probation or peace officer with any passwords, passcodes, password patterns, fingerprints or other information necessary to access those media." Defense counsel objected that modified condition remained overbroad.

Conditions of probation are reviewed for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) "Generally, '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . ." [Citation.]' (*Lent, supra,* 15 Cal.3d at p. 486.) This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. (*Id.* at p. 486, fn. 1; see also *People v. Balestra* (1999) 76 Cal.App.4th 57, 68–69.) As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality. (See [*People v.*] *Carbajal* [(1995)] 10 Cal.4th [1114,] 1121.)" (*Olguin*, at pp. 379–380.)

The first two prongs of the *Lent* test are clearly satisfied here. Electronic devices played no role in the offenses J.C. was found to have committed,[4] and use of electronic devices is not in itself criminal. Respondent argues that the condition is valid under the third prong because it is reasonably related to future criminality in that it enables the probation department to effectively supervise J.C. Respondent points to our Supreme Court's statements in *Olguin* that a condition "that enables a probation officer to supervise his or her charges effectively is . . . 'reasonably related to future criminality' "even if [the] condition . . . has no relationship to the crime of which a defendant was convicted" (*Olguin, supra,* 45 Cal.4th at pp. 380–381), as well as to the court's comments in *People v. Ramos* (2004) 34 Cal.4th 494, 505–506, about search conditions serving to deter commission of crimes.

We do not read *Olguin* as holding that *every* condition that could enable a probation officer to supervise a minor more effectively is necessarily "reasonably related to future criminality." (*Olguin, supra,* 45 Cal.4th at p. 381.) The condition at issue in *Olguin* merely facilitated an unchallenged residence search condition by requiring notice to the probation officer of pets in the residence. That condition was far narrower in scope than an electronic search condition requiring a minor to provide access to the wide range of data potentially stored on electronic devices and password-protected Internet sites, which adds significantly to the scope of the areas subject to warrantless search and authorizes a tremendous intrusion into the minor's privacy. Such a condition may be reasonably related to future criminality in a particular case, even where the underlying offense is not directly tied to use of electronic devices, where a minor's history and overall circumstances make it reasonable for the probation department to search electronic devices and/or internet activity to monitor compliance with conditions such as refraining from use of drugs (as in *In re P.O.* (2016) 246 Cal.App.4th 288) or avoiding

[4] Respondent argues that the first prong of *Lent* was "implicated" because J.C. used his cell phone to threaten his father. But, as respondent recognizes, the juvenile court did not sustain the allegations that J.C. made a criminal threat. The only offenses he was found to have committed were resisting an officer and battery on an officer, neither of which had any connection to electronic devices.

contact with specified individuals or prohibited locations. But if there is nothing in a minor's current offenses, criminal history or personal circumstances demonstrating a predisposition to use electronic devices in connection with criminal activity, there is no basis for concluding an electronic search condition " 'will serve the rehabilitative function of precluding [the minor] from any future criminal acts.' " (*In re Erica R.* (2015) 240 Cal.App.4th 907, 913, quoting *In re D.G.* (2010) 187 Cal.App.4th 47, 53.) The condition must be reasonably related to future criminality in that it would be a reasonable means of deterring future crime by this particular minor, based on all the circumstances of this particular case.

Here, the probation department's disposition report related that J.C. had been evaluated as being at high risk for reoffending and noted concerns with his "family circumstances, overall poor school performance, substance use and experimentation, struggles with aggression and emotional regulation and pro-criminal thinking." The report related that school records showed J.C. had been suspended several times for "causing/attempting or threatening physical injury" and received a number of detentions and "entries" for "defiance/disrespect" and classroom disruption. J.C. admitted experimenting with alcohol on one occasion at age 11 and with marijuana five times between October and December 2017. At the disposition hearing, court expressed concern about information received from J.C.'s schools about his "poor performance, his suspension, . . . the aggression that he has exhibited over at least a year," and the prosecutor and probation officer expressed concern that J.C.'s drug experimentation was recent and might continue.

Nothing in this report or elsewhere in the record suggests a connection between J.C.'s offenses or the concerning aspects of his history and his use of electronic devices. The offenses themselves were clearly spontaneous, not something that would have been documented in electronic communications or social media posts. The same is true of the behavioral issues reflected in J.C.'s school records. The minor history of drug use indicated by the record reflects no connection to electronic devices or social media. As in *In re Erica R.*, because nothing in J.C.'s offenses or personal history suggests a

" 'predisposition' to utilize electronic devices or social media in connection with criminal activity, 'there is no reason to believe the current restriction will serve the rehabilitative function of precluding [him] from any future criminal acts.' " (*In re Erica R., supra,* 240 Cal.App.4th at pp. 912-913, quoting *In re D.G., supra,* 187 Cal.App.4th at p. 53.)

The electronics search condition is invalid under *Lent* and the trial court abused its discretion in imposing it.

**DISPOSITION**

The dispositional order is modified to strike condition 15 pertaining to electronic devices. In all other respects, the dispositional order is affirmed.

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Kline, P.J.

We concur:

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Richman, J.

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Stewart, J.

*In re J.C.* (A154000)